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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/772,526	02/05/2004	N.R. Gandhi	5333	5398
22922	7590	05/03/2007	EXAMINER	
REINHART BOERNER VAN DEUREN S.C.			CHAWLA, JYOTI	
ATTN: LINDA KASULKE, DOCKET COORDINATOR			ART UNIT	PAPER NUMBER
1000 NORTH WATER STREET			1761	
SUITE 2100				
MILWAUKEE, WI 53202				
			MAIL DATE	DELIVERY MODE
			05/03/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)
	10/772,526	GANDHI ET AL.
Examiner	Art Unit	
Jyoti Chawla	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1) Responsive to communication(s) filed on 26 January 2007.

2a) This action is **FINAL**. 2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4) Claim(s) 1-17 is/are pending in the application.
4a) Of the above claim(s) 18-33 is/are withdrawn from consideration.

5) Claim(s) _____ is/are allowed.

6) Claim(s) 1-17 is/are rejected.

7) Claim(s) _____ is/are objected to.

8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) All b) Some * c) None of:
1. Certified copies of the priority documents have been received.
2. Certified copies of the priority documents have been received in Application No. _____.
3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a))

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) Notice of References Cited (PTO-892)
2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____

4) Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
5) Notice of Informal Patent Application (PTO-152)
6) Other: _____

DETAILED ACTION

Applicant's amendment dated January 26, 2007 has been entered. Claims 18-33 have been cancelled. Claims 1-17 are pending and examined in the application.

Claim Rejections - 35 USC § 112

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1-14 and 16 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The rejections are incorporated herein and as cited in the office action mailed July 27, 2006.

Applicants argue that that the phrase "incorporating at least one of an oil and a fat component and said fermented soy composition." as recited in claims 1 and 11, is not indefinite, and that there is only one reasonable interpretation of the phrase(Remarks, Page 5, lines 9-14). The applicant further states that "said fermented soy composition" is defined in previous elements of these claims, so the clear meaning is to incorporate new materials with it, not to incorporate the composition into itself" (Remarks, page 5, lines 14-17). However, the applicant uses the term "or" in the explanation of the claim interpretation, e.g., "Use of the inclusive term "comprising" means that the terms "oil" and "fat" in claim 1 can be independently either singular or plural and that, at a minimum, either at least one oil or at least one fat is incorporated." It is unclear from applicant's argument as to which one of the three optional interpretations provided by the applicants is the one to be considered. Further, the interpretation as argued, needs to be reflected in the claims in order to clarify the claimed subject matter so that it is clear and distinct.

It is also unclear whether the applicants wish to include the term "and" as recited in the claims 1 and 11 or use the term "or" as provided by the applicants in the arguments (Remarks, page 5) as "and" and "or" lend different meanings to the claims.

Regarding the second "and" in the phrase "incorporating at least one of an oil and a fat component and said fermented soy composition", it is not clear whether the term "and" means that at least an oil or a fat component is added "into/to" the said fermented soy composition. The words "and" and "into or to" do not mean the same in the context recited. Thus applicant's argument regarding the claim language of claims 1 and 11 as not being indefinite, has not been found persuasive and the rejections are maintained for the reasons of record.

Similar arguments have been provided in response to the 35 USC 112(2) rejection made in the office action dated July 27, 2006, that apply to dependent claims 2, 3, 5 and 6. In claim 3, the phrase, "at least one of a food grade acid and a salt of said acid". In the explanation of the claim interpretation the applicant makes use of the term "or" (as in Remarks, page 5, lines 18-25) where the applicant states "Either or both of "food grade acid" or "salt of said acid" could be, but need not be, plural. Claims 5 and 6 require, at a minimum, either at least one sufficient time or at least one sufficient temperature. The claim 5 (6) language could be satisfied by any time(s), any temperature(s), or any combination(s) thereof that are sufficient to discontinue fermentation (provide a substantially aseptic sour cream composition)." However, it is unclear why the term "and" as recited in claims 2, 3, 5 and 6, is being equated in meaning to an "or" in the explanation provided by the applicant, where the terms "and" and "or" do not lend the same meaning to the claims. Therefore, applicants' arguments have not been found persuasive and the rejections are maintained for the reasons of record.

Claim 16 recites "comprising incorporation of said fermented composition with a fat component sufficient to provide a sour cream." Regarding the rejection of claim 16, under USC 35 112(2), the applicant refers to the claim language as definite by arguing that one of ordinary skill in the art at the time of the invention would be able to determine the sufficient fat component level for sour cream. However, the claim as recited, is still considered indefinite for the purposes of prior art comparison because it is unclear as to how much fat needs to be in the final fermented soy product of the prior

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art for it to be classified as soy based sour cream or imitation sour cream. For the purpose of expedited examination a fermented soy product with added fat or oil would be considered relevant prior art. Clarification and /or correction is required.

Claim Rejections - 35 USC § 102

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1, 2, 4-12 and 14-17 are rejected under 35 U.S.C. 102(b) as being anticipated by Marshall et al. (US 4,678,673).

The references and rejection are incorporated herein and as cited in the office action mailed July 27, 2006.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 3 and 13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Marshall as applied to claims 1,2,4-12 and 14-17 above, and further in view of Tsumura et al (US 3857970).

The references and rejection are incorporated herein and as cited in the office action mailed July 27, 2006.

Response to Arguments

Applicant's arguments filed January 26, 2007 have been fully considered but they are not persuasive.

- I) Applicants' arguments regarding the rejections under 35 U.S.C. 112(2) have been considered and responded in the office action above.
- II) Regarding the rejection of claims 1, 2, 4-12 and 14-17 under 35 U.S.C. 102(b) as being anticipated by Marshall (US4678673), the applicant's argue that the fermentative

species of bacteria, i.e., *Lactobacillus casei*, as taught by Marshall (Column 2, lines 28-32), are not thermophilic and thus applicant's invention, as instantly claimed, is not anticipated by the Marshall reference (Remarks, page 6). This argument, however, is not convincing as the applicants disclose the *Lactobacillus casei* species as thermophilic (Specification publication [0026]).

III) Regarding the rejection of claims 3 and 13 under 35 U.S.C. 103(a) as being unpatentable over Marshall (US4678673), in view of Tsumura (US3857970), applicant's argue that Tsumura teaches away from the teachings of Marshall. In response, the applicant is referred to the rejection in the previous office action.

a) Applicants argue that Tsumura reference teaches away from Marshall reference because the references do not teach of the same product. In response to applicant's argument that Tsumura reference is nonanalogous art, it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992).

Regarding the references teaching two different products, applicants are referred to Marshall that teaches of methods for fermenting oilseed products having a dairy like flavor, i.e., imitation dairy products such as cream cheese. Thus imitation cream cheese spreads and dips (Column 2, lines 18-26) are examples of the products taught by Marshall. Tsumura teaches of imitation cheese like food made from soy which is also obtained by fermentation. Thus both Marshall and Tsumura teach fermentation soy products and teaching a method(s) with which multiple products can be made (Marshall) is not teaching away from a method to produce a single product.

Furthermore the reasons for which Tsumura has been relied upon to modify Marshall are:

- 1) Show an alternative soy raw material used to make the aqueous soy composition (claim 3),

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2) Show conventionality of using a combination of species of bacteria especially lactobacillus and streptococcus together in preparation of fermentation of soy products (claim 13).

Both these components of applicant's invention were known in the art at the time of the invention of making fermented soy products such as soy yogurt, soy cheese, soy cream cheese etc. Therefore, Tsumura does not teach away from the invention as taught by Marshall as stated in applicant's remarks on page 7, as both the references teach bacterial fermentation products of soy. The two references used are not only in the same field of endeavor as the applicant's invention; i.e., imitation dairy type fermented soy products, but are also pertinent to the particular problems that the invention is trying to solve as discussed above.

b) Specifically regarding claim 3, as recited, Marshall teaches that aqueous soy composition comprises water, a ground soybean that has been made into a slurry (column 3, lines 55-60 and column 6, line 62) whole soybean particulate and at least one of a food grade acid and a salt of said acid (Column 3, lines 10-25). Marshall does not specifically teach using dry whole soybean particulate to make the soymilk as recited in claim 3. Tsumura, teaches of fermenting the aqueous soy composition and using dry soy products to make soymilk (Column 2, lines 25-27, Columns 1-3 and Column 2). Thus Tsumura has been relied on to show the conventionality of making aqueous soy composition by dispersing a dry whole soybean particulate. Therefore, it would have been obvious to the one with ordinary skill in the art to modify Marshall based on the teachings of Tsumura, and use a dry soy product to make aqueous soy composition (or soy milk) in place of soaking the beans and making slurry, to expedite the process of making the final fermented soy product. One of ordinary skill in the art would have been motivated to do so to save time as making aqueous soy composition from dry whole soybean to get the benefit of the whole legume seed and also reduce the time required to make the liquid soy composition prior to the process of fermentation thus making the overall process faster and more economical than soaking the beans to make the slurry. Thus Tsumura reference does not teach away from the teaching of

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Marshall regarding claim 3. Applicant is also referred to the rejection of claim 3, made in the previous office action dated July 27, 2006.

c) Specifically regarding claim 13, Marshall teaches fermenting soymilk composition with *Lactobacillus* as discussed in claims 1,11 and 15 above, however Marshall does not teach the thermophilic bacterial culture with at least one *Lactobacillus* strain and at least one *Streptococcus* strain as recited by the applicant. Starter culture of thermophilic or heat tolerant bacteria such as *Streptococcus* and *Lactobacillus* to ferment soymilk has been known and Tsumura teaches fermentation of soymilk using *Lactobacillus* strain and one *Streptococcus* strain, specifically *Streptococcus thermophilus* (Column 4, lines 24-30). Thus Tsumura has been relied upon to show conventionality of using combination of *lactobacillus* and *Streptococcus* species of thermophilic bacteria in fermentation of soymilk or aqueous soy composition. Therefore, one of ordinary skill in the art would have been motivated to modify Marshall and use a combination of *Lactobacillus* and *Streptococcus* because the combination has good ability for formation of diacetyl and acetoin (indicators of fermentation), which would make the fermented soy based dairy like product with good flavor in a shorter fermentation time. Therefore, applicant's arguments regarding claims 3 and 13 are not persuasive and the rejections are maintained for the reasons of record. Thus the rejections of claims 1-17 have been maintained for the reasons of record.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any

extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jyoti Chawla whose telephone number is (571) 272-8212. The examiner can normally be reached on 8:00 am to 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



Jyoti Chawla
Examiner
Art Unit 1761



KEITH HENDRICKS
PRIMARY EXAMINER